No. 83-1290

In the Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 308 of the Clean Water Act, 33 U.S.C. 1318, authorizes EPA to enter the facilities of a point source of water pollution and obtain samples of wastewater streams prior to their final treatment.*

*The Petition also presents a question of the sufficiency of the affidavits submitted in support of the application for an administrative search warrant in this case. We do not believe this issue is properly before this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 716 F.2d 1187. The final order and judgment of the district court (Pet. App. 9a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1983. A petition for rehearing was denied on November 8, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed on February 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 308 of the Clean Water Act, 33 U.S.C. 1318, provides in pertinent part:

> (a) Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), and 1364 of this title—
>
> (A) The Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and
>
> (B) The Administrator or his authorized representative, upon presentation of his credentials—
>
> (i) shall have a right of entry to, upon or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under Clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

STATEMENT

1. Petitioner operates a petroleum refinery near Joliet, Illinois. In the course of normal plant operations, the facility discharges wastewater into a navigable river. Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. 1342, the Illinois Environmental Protection Agency issued a National Pollutant Discharge Elimination System (NPDES) permit authorizing petitioner to make such discharges subject to the restrictions set forth in, or incorporated into, the permit (Pet. App. 15a-40a). Among other things, the permit requires petitioner to conduct periodic sampling of its various wastewater streams "at a point representative of [the] discharge" but "prior to mixing with other effluent streams" or "prior to its combination with the process water" and to forward the results to both the United States Environmental Protection Agency (EPA) and the State agency (Pet. App. 18a-26a).

On April 28, 1982, Basim J. Dihu, an EPA environmental engineer, attempted to conduct an inspection of petitioner's Joliet facility. Dihu was admitted to the premises and permitted to take samples of the process treatment plant and non-contact cooling water, as well as storm water discharge. Petitioner refused, however, to permit Dihu to sample internal waste streams before the point at which they reach an aeration basin or a treated water guard basin. Permission to obtain samples of sludge before heat treatment was similarly refused. Pet. App. 2a, 46a-47a.

2. On August 27, 1982, EPA applied to the district court for an administrative warrant "to enter, inspect and photograph the premises and to take samples of sludge and liquid

influents and effluents at the Mobil Oil Company facility * * * on three separate days within a ten-day period in accordance with Section 308 of the Clean Water Act" (Pet. App. 42a). The warrant application was supported by an affidavit executed by Dihu recounting petitioner's refusal to allow him to take the requested samples (Pet. App. 46a-47a). The warrant application was also supported by the affidavit of Jonathan Barney, an EPA chemical engineer (Pet. App. 43a-45a). Barney's affidavit stated that petitioner's facility had been selected for inspection pursuant to "an ongoing administrative program to monitor facilities that have some potential for the discharge of toxic pollutants" (Pet. App. 45a). Such extended compliance sampling inspection for toxicants (known as CSI-Ts) is intended to check for compliance with existing permit requirements and to determine whether toxic pollutants are being discharged that are not subject to permit limitations, but which should be regulated in future permits (*id.* at 43a). Barney further explained that, for a complex plant such as petitioner's facility, samples must often be collected from selected process waste streams within a plant, as well as from the final effluent, in order to achieve the most accurate measurements possible, to assess the adequacy of existing treatment methods, and to eludicate the nature of the sludge resulting from treatment (*id.* at 44a). The Barney affidavit described the specific locations at which EPA desired to take samples, concluding that "[a]nalysis of these samples is necessary to enable the U.S. EPA accurately [to] assess compliance and develop any necessary new permit limits for this Mobil Oil facility" (*id.* at 45a).

The United States Magistrate granted the warrant application and issued the inspection warrant on August 27, 1982. The warrant authorized inspector Dihu to (Pet. App. 49a-50a):

1. Ent[er] * * * upon or through the above described premises including all buildings, structures, equipment, machines, devices, materials and sites to inspect, sample, monitor and investigate the said premises.

2. Sample and seize combined effluent from the east and west clarifiers of the activated sludge treatment system.

3. Sample and seize sludge prior to the heat treatment system.

4. Sample and seize influent to the east and west aeration basins to the activated sludge treatment system (combined raw waste following east equalization basin).

5. Sample and seize any and all final effluent(s).

6. Take such photographs of the above authorized procedures as they may be required or necessary.

EPA commenced execution of the warrant and taking of samples. Petitioner filed a motion to quash the warrant, but the motion was denied by the magistrate. Thereafter, EPA completed execution of the warrant.

3. Petitioner commenced this action on September 2, 1982. Petitioner's complaint alleged, inter alia, that "[t]he Clean Water Act does not authorize U.S. EPA to inspect, sample or monitor MOBIL'S internal waste streams at points other than the NPDES point source discharge" (C.A. App. 5) and that the warrant exceeded the scope of EPA's statutory powers. Petitioner sought an injunction directing the EPA to return "all samples taken, findings, test results and any other data, records or documents" resulting from the completed inspection and barring EPA "from at any time inspecting, sampling or monitoring

MOBIL'S internal waste streams at points other than the NPDES point source discharge" (C.A. App. 6-7).

Petitioner's action was consolidated with an appeal taken by petitioner from the magistrate's order denying its motion to quash the warrant. The district court entered an interlocutory order restraining EPA from disclosing or using the contested samples or any information derived from them pending a final decision. After considering the case on the merits, the district court entered a final order dissolving the preliminary injunction, denying injunctive relief, and dismissing the complaint (Pet. App. 9a-13a).[1]

4. The court of appeals affirmed (Pet. App. 1a-8a). The court held that Section 308(a) of the Clean Water Act authorizes EPA to sample the wastewaters of a point source at any location within the facility, including wastewaters prior to treatment or partially treated effluents. The court observed that Section 308(a)(1) indicates that one of the primary purposes of Section 308 was to give EPA access to information useful in " 'developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance' " (Pet. App. 5a, quoting Section 308(a)(1)). To achieve the statutory goal of setting rational effluent limitations, "information is necessary to determine how efficiently the permittee is treating the water, which obviously requires a sample of water both before and after treatment" (Pet. App. 5a). The court also noted that EPA can more accurately assess samples of the final treated

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[1] The court of appeals entered an interim injunction prohibiting EPA from using, transmitting or releasing any of the samples obtained pursuant to the warrant or information derived from those samples during the pendency of the appeal. The stay order also barred EPA from "inspecting, sampling or monitoring Mobil's waste streams at points other than those described in the National Pollutant Discharge Elimination System Permit pending disposition of this appeal."

effluents "if it knows the level of pollutants in that waste water before it has been treated" (Pet. App. 6a).[2]

ARGUMENT

Petitioner's primary submission (Pet. 12-21) is that the affidavits that EPA submitted in support of its application for an administrative warrant did not meet the standards articulated by this Court in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), and *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). This issue was not raised in the court of appeals and accordingly is not properly presented here. In any event, the affidavits in question satisfy the standards delineated in *Barlow's* and *Camara*. In addition, petitioner contends (Pet. 21-27) that, in the circumstances of this case, Section 308 of the Clean Water Act affords EPA no authority to obtain samples of its wastewater before it has been fully treated. The court of appeals correctly rejected this contention.

1. In *Camara* v. *Municipal Court*, this Court held that, outside of certain carefully defined classes of cases, a warrantless non-consensual search of private property is unreasonable even though not undertaken to uncover evidence of crime. At the same time, however, the Court held that, in the context of such civil administrative searches, a warrant need not rest upon a showing of probable cause to believe that a violation is occurring in the location to be inspected. 387 U.S. at 534. Rather, a warrant may issue where the applicant has shown that its request to search private property is justified by reasonable governmental

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[2]The court of appeals denied petitioner's motion to stay issuance of its mandate pending certiorari. Thereafter, on November 23, 1983, Justice Stevens denied petitioner's application to stay issuance of the court of appeals' mandate and to bar EPA from employing the samples it had obtained or conducting further sampling pending dispostion of this petition.

interests. "[R]easonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. In the companion case of *See* v. *City of Seattle*, 387 U.S. 541 (1967), the Court held that the general requirement of obtaining a warrant for searches applies in the context of commercial buildings as well as private residences.[3]

In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), this Court reaffirmed that the Fourth Amendment ordinarily requires authorities to obtain a warrant prior to conducting an administrative search of a commercial establishment. Again, however, the Court emphasized that the government need not show that a specific violation is likely taking place in a particular establishment. "Probable cause in the criminal law sense is not required" (*id.* at 320). Rather, a warrant may issue upon a "showing that a specific business has been chosen for a * * * search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (*id.* at 321). The Court explained: such "[a] warrant * * * would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed" (436 U.S. at 323 (footnotes omitted)).

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[3]In *See*, this Court left open the question of whether "business premises may not reasonably be inspected in many more situations than private homes * * *." 387 U.S. at 546. Recently, in *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981), this Court stated that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home" and recognized that, in certain commercial circumstances, this expectation may be so limited as to justify warrantless searches.

b. Petitioner asserts that the affidavits that EPA submitted in support of its warrant application did not satisfy the foregoing standard and complains that "the Seventh Circuit did not examine EPA's action in light of the standards set forth in *Barlow's*" (Pet. 13.) The court of appeals' failure to advert to *Barlow's* or *Camara*, or to address the adequacy of EPA's affidavits, however, affords no basis for complaint in this Court for petitioner simply did not contend on appeal that those affidavits were in any way deficient.[4] Because petitioner failed to raise its primary contention in the court of appeals and the court of appeals' opinion reflects no ruling on that point, the issue is not properly before this Court. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

c. Even if it had been properly presented, the question of the sufficiency of EPA's affidavits merits no further review, for the affidavits satisfied the *Barlow's* and *Camara* standards. The affidavit of Jonathan Barney (Pet. App. 43a-45a)

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[4]Contrary to petitioner's suggestion (Pet. 13) the court of appeals did not "use[] its own 'interest-balancing' analysis to determine whether Mobil had any Fourth Amendment rights * * * worthy of protection and whether EPA's regulatory interest out-weighed Mobil's privacy interest". The court of appeals confined its opinion to the question whether Section 308 of the Clean Water Act authorized EPA to obtain the samples at issue. The court's language quoted at pages 13-14 of the petition clearly addresses this statutory argument and not any Fourth Amendment issue. In the court of appeals, petitioner argued only that the sampling conducted under the warrant was not authorized by Section 308 (Pet. C.A. Br. 7-35; Pet. C.A. Reply Br. 4-21). Petitioner did not challenge the sufficiency of EPA's affidavits, and did not cite *Camara* at all. *Barlow's* was cited only in connection with petitioner's argument that injunctive relief from the alleged statutory violation should be granted (Pet. C.A. Br. 37, 40; Pet. C.A. Reply Br. 22). Petitioner invoked the Fourth Amendment only in asserting that, because ultra vires, the challenged inspection was an unreasonable intrusion upon its protected privacy interests (see Pet. C.A. Reply Br. 22 & n.17). Nor did petitioner's rehearing petition present the contention now made in this Court.

explained that petitioner's facility had been selected for inspection as part of an ongoing EPA program to monitor facilities having some potential for discharge of toxic pollutants. The purposes and operations of that program were also described. Barney's affidavit also explained why EPA believed that the challenged sampling procedures were necessary and it precisely identified the samples that EPA sought. In the proceedings below petitioner did not challenge the accuracy of any of the facts in the affidavits.[5] The warrant was carefully limited both in scope and duration. See pages 3-5, *supra*. Petitioner, moreover, has not demonstrated that it was subject to discriminatory treatment or deliberate harassment; nor has it shown that the sampling authorized constituted any more than the most minimal of intrusions upon its normal operations.[6] Under these circumstances, the warrant was clearly valid.

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[5]Petitioner now attempts to do so for the first time in this Court (Pet. 16-17) relying on materials reproduced at pages 51a-94a of its appendix. None of these materials are part of the record below; they were not considered by the courts below. Nor has petitioner demonstrated that they could not have been timely obtained with due diligence. Petitioner's effort to retry its case in this Court is impermissible. In any event, a close reading of the materials cited by petitioner discloses that they do not support its claims. For example, petitioner asserts (Pet. 17) that EPA policy requires a "lengthy" affidavit when EPA seeks information from a source and refers to certain documents in the appendix to support this conclusion. The cited materials, however (even assuming that they establish a binding agency policy), nowhere require a "lengthy" affidavit. Rather they indicate that the affidavit should fully describe the agency program involved and explain why the particular facility in question was selected for inspection (Pet. App. 57a). As indicated above, the Barney affidavit meets this standard. The fact that a different EPA employee may have submitted a lengthier affidavit when seeking to inspect a different facility in a different industry for different purposes (See Pet. App. 77a-85a) does not establish that EPA's affidavit here was inadequate. Petitioners' other assertions are similarly flawed.

[6]Petitioner has not claimed that EPA's sampling threatens to compromise any trade secret. Section 308(b)(2) of the Clean Water Act, 33 U.S.C. 1318(b)(2), provides a special mechanism whereby an owner or

2. Section 308(a)(A)(iv) of the Clean Water Act, 33 U.S.C. 1318(a)(A)(iv), provides that the Administrator shall require the owner or operator of a point source to "sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)." Section 308(a)(B)(ii), 33 U.S.C. 1318(a)(B)(ii), in turn, authorizes the Administrator or his authorized representative to sample "any effluents" which the owner or operator is required to sample under the prior clause. Petitioner asserts (Pet. 21-27) that Section 308 does not authorize EPA to secure samples of its untreated or partially treated wastewaters. The courts below correctly rejected this contention. In any event, the decision below does not — and is not asserted to — conflict with any decision of this Court or of any court of appeals and warrants no further review.

Petitioner initially asserts (Pet. 21-22) that the wastewaters coming out of its various production facilities do not become "effluents" within the meaning of Section 308 until after they have been fully treated and are ready for discharge into navigable waters. Petitioner fails to advance any creditable argument in support of this assertion. As petitioner acknowledges (Pet. 21), the term "effluent" is not defined by the Act. When a term is not defined in a statute itself, the courts will, whenever possible, assign the word a meaning that is consistent with the ordinary meaning of the term, which effectuates the purposes for which the statute was enacted, and which does not render other provisions of the statute meaningless. *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). EPA's interpretation of "effluent" is the only one which meets all of these standards.

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operator who supplies information pursuant to Section 308 may seek to have the information held confidential. Petitioner has not attempted to invoke this provision.

The conventional meaning of "effluent" is "something that flows out." [7] Accordingly, EPA has sensibly understood "effluent" to include those wastewaters that flow out of production facilities. Moreover, EPA's interpretation effectuates the purposes of the Clean Water Act. For example, pursuant to Sections 301 and 304, 33 U.S.C. 1311 and 1314, EPA must establish, periodically review and, if appropriate, revise, effluent limitations that require the application of the best available technology economically achievable (BAT) for a given category or class of discharges. See *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 69-72 (1980).[8] This task requires that the agency be thoroughly familiar with all facets of wastewater treatment technology and economics. The ability to take samples at a variety of locations in the course of a pollution treatment process significantly enhances EPA's ability to establish and maintain rational effluent limitations.[9] Finally,

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[7] *Webster's New Collegiate Dictionary* 363 (1977).

[8] Section 301(d), 33 U.S.C. 1311(d). The statutory duty periodically to review and revise effluent limitations belies petitioner's suggestion (Pet. 25-27) that because effluent limitations for petitioner's facility have already been initially established, EPA could have no possible use for any data derived from the sampling here.

[9] As the court of appeals observed (Pet. App. 5a) Section 308 was expressly designed to provide the EPA Administrator with a means of obtaining information needed for "developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance (§ 308(a)(1), 33 U.S.C. 1318(a)(1)). The legislative history of the Clean Water Act confirms that EPA's inspection and sampling authority is to be construed broadly. Thus, in explaining the need for Section 308, Congress specifically pointed out the agency's "difficulty in obtaining reliable cost and waste loading information to set effluent limits and to enforce effective pollution control." H.R.Rep. 92-911, 92d Cong., 2d Sess. 113-114 (1972). Indeed, unless EPA can secure this kind of data, it may be vulnerable to challenges to the validity of its effluent limitations in which it is argued that the limitations do not reflect consideration of all pertinent data. See *National Lime Ass'n* v. *EPA*, 627 F.2d 416, 442-443 (D.C. Cir. 1980).

petitioner's suggestion (Pet. 22) that the term "effluent" encompasses only wastewaters at the point of their discharge into navigable waters renders several other provisions of the Act meaningless. For example, Section 308 expressly provides for inspections, monitoring and sampling to assist in development of "pretreatment standards" pursuant to Section 307 of the Act, 33 U.S.C. 1317, which applies to discharges to publicly-owned treatment works. Petitioner's restrictive interpretation of the term "effluent" would render these provisions inoperative. See also Section 402(b)(8) of the Act, 33 U.S.C. 1342(b)(8).

Petitioner also argues (Pet. 23-24) that Section 308 limits the Administrator to sampling those effluents that the point source itself has been required to sample. Assuming that petitioner's premise is correct, petitioner still cannot prevail here. As petitioner admits (Pet. 24), it is required by the terms of its permit to take samples of its effluents. Pursuant to the warrant, EPA obtained samples of those same effluents, only at locations different from those at which petitioner performs its own sampling. Nothing in Section 308, however, confines EPA's authority to sample effluents to the particular locations at which the owner or operator performs sampling to meet the requirements of its NPDES permit.[10]

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[10]The court of appeals properly rejected (Pet. App. 4a-7a) petitioner's claim that sampling of a given waste stream at two locations in the course of treatment constitutes sampling of two different effluents for purposes of Section 308.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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